

ANSWERING ANOTHER ‘IRISH QUESTION’: BREXIT AND THE IRISH BORDER

Gladstone .. spent his declining years trying to guess the answer to the Irish Question; unfortunately, whenever he was getting warm, the Irish secretly changed the Question

W.C. Sellar and R. J. Yeatman *1066 and All That: A Memorable History of England* (1930)

PART THREE: SOLVING THE BORDER CONUNDRUM?

“Contrariwise,” continued Tweedledee, “if it was so, it might be; and if it were so, it would be; but as it isn’t, it ain’t. That’s logic’.” Lewis Carroll, *Alice’s Adventures in Wonderland* (1865)

1.MOVING THE BORDER

(i) ‘Null’ change at the Irish border?

Negotiations began on the withdrawal terms after the United Kingdom triggered Article 50, giving formal notification of intention to leave the EU on March 29 2019. It was clear from the outset that the principal objective was to recover autonomy in matters of international trade and legal sovereignty, whilst seeking a special or ‘bespoke’ withdrawal deal that retained some access to the EU market. Brussels after almost two years of negotiations has so far refused to acquiesce to requests for special treatment. Not least because to do so might encourage other Member States to withdraw from the EU on similarly bespoke terms. How then should we evaluate the procedural options proposed by parties to these negotiations for resolving the border conundrum post-Brexit?

During the opening phase of the Brexit negotiations, the United Kingdom made various proposals for addressing border management in Ireland, although by no means all of them a convincing answer to the problem. These proposals have in common what game theorists describe as ‘free riding’ and EU negotiators as ‘cherry picking’ or ‘having cake and eating it’. On the one hand, retaining all or most of the commercial advantages of EU membership whilst avoiding any requisite responsibilities, not least the acceptance of free movement of people and continuing legal oversight by the European Court of Justice of common trade and related matters.

The most controversial proposal to emerge so far from these negotiations, and one favoured by EU27 negotiators and some British politicians and business interests is to avoid a politically contentious border’ in Ireland by the controversial proposal to relocate the border

to the middle of the Irish Sea. An arrangement that eventually became the EU's so-called 'backstop' arrangement for ensuring that in the event of a 'no deal' Brexit, there would be assurances that no formal border would be reinstated on the island of Ireland. The principle of 'backstop' was agreed and by all parties at the European Council that concluded preliminary withdrawal negotiations., although since then 'backstop' is interpreted quite differently by these parties. A 'backstop' is a mutual understanding whereby a British withdrawal agreement would not happen without arrangements in place to prevent a hard border. As Brussels sees it, 'backstop' is intended to ensure no border in island, and to that end Northern Ireland, alone of the constituent parts of the British State, would remain as a full member of the customs union and / or the Single Market. For their part, the British reject this particular interpretation, arch Brexiteers regarding this very idea as a trap, subterfuge by EU negotiators and supported by British 'remainers' intended to pressurise the United Kingdom to retain a foothold in the EU. Northern Ireland unionists too share these reservations, seeing the very idea of 'backstop' as malign conspiracy to detach their political destiny from that of the rest of the United Kingdom, severing the cultural bonds and constitutional links that bind Northern Ireland to the British State, and by degrees abandoning the Province to a re-united Ireland. Assurances from the Dublin government that the Republic's sole objective is not "a land grab in Northern Ireland" in order to impose a unified island but merely to ensure an invisible border, are rebutted by unionists.¹

As pragmatists see it, the practical advantage for Northern Ireland remaining in the present, or some reconfigured customs and / or SEM / EEA arrangement would be the maintenance of closer regulatory alignment across the Irish border, and by such means avoiding the usual paraphernalia of a formal border. The North would continue to conform to EU technical standards and other regulatory requirements and likewise remain within the Common External Tariff, continuing to observe EU rules on customs and related tariffs / duties. The preference here is free trade, ease of movement for goods, market access for the services sector and transit of people across the border without hindrance. Arrangements that have to date contributed to cross-border structural integration, closer social co-operation between border communities on both sides, not least by ensuring mutual access to generous EU structural funds and framework programmes indispensable for maintaining peace by means of economic growth and managed prosperity. A logical 'solution' for border management, but one that is altogether easier to prescribe than to deliver precisely because it prioritizes economic rationality over raw politics, juxtaposing the antithetical reflexes of logic and sensibility in politics, competing motivations always difficult to reconcile and especially so in this land where visceral emotion usually trumps plain reason and common sense. For that very reason, a 'solution' firmly resisted by most Brexiteers, whether in Northern Ireland or on the British mainland ideologically committed to taking the United Kingdom out of the EU in any and every sense. An outcome too that is unlikely to succeed precisely because it fails the supreme ideological test, comes up against what for these resolute sovereigntists is the inviolable 'red-line' of 'taking back control' of national borders. For unionists, whether in

¹ Lisa O'Carroll, Michel Barnier: Brexit talks at risk of collapse over Irish border, *The Guardian* (London), 30 April 2018, available online at <https://www.theguardian.com/politics/2018/apr/30/michel-barnier-brexit-talks-at-risk-unless-uk-softens-irish-border>.

Northern Ireland or mainland Great Britain this proposal is repugnant, a clear ‘red line’ and as such politically untenable.

The proposal to move the Irish border to the middle of the Irish Sea has found greater favour with mainstream politicians in the Republic, nationalists in the North and *fonctionnaires* in the Brussels institutions, although by no means all of them sharing the same intentions.² The logics here are as follows: that the only feasible solution to the otherwise insuperable conundrum of a Brexit that avoids a hard north-south border on the island, is to install an east-west border between the *whole* of Ireland and the *rest* of the UK. A proposal intended to keep Northern Ireland at the very least within the customs union, although a more ambitious variant along similar lines anticipates the Province remaining in the Single Market too.³

What this eccentric ‘solution’ offers as expedient common sense however, it lacks in political acumen. For nationalists and predictably, it offers a clear route to eventual Irish reunification. Whereas for pragmatists in Dublin an invisible or non-border is primarily a means for obviating the impediments of economic barriers and avoiding reviving political tensions supposedly dispelled by the peace process. In this clash of irreconcilable preferences, politics has prevailed over rationality, as it usually does and not only in Irish affairs. When this proposal was first raised during the preliminary Brexit negotiations, it immediately brought accusations of betrayal from unionists, proof positive as they saw it of a pernicious plot by nationalists to use the border predicament as leverage for bringing about Irish reunification.⁴

The British government too has refused to contemplate this ‘solution’, or at least the version of ‘backstop’ preferred by Brussels and Dublin, and for similar if not identical reasons. In part, because the governing Conservative party is ideologically wedded to the historic idea of an indivisible union, and more prosaically because after its setback in the 2017 general election it finds itself dependant for a working parliamentary majority on ten pro-Brexit Democratic Unionist MPs elected for Northern Ireland constituencies. A parallel concern here for Conservatives is avoidance of a constitutional crisis. The contemporary political climate in Britain is hardly conducive to radical constitutional engineering. Moderate northern Irish unionists and even mainstream public opinion on the mainland is more

² *The Case for the North to Achieve Designated Special Status within the EU*, Sinn Féin, (Belfast/Dublin: Sinn Féin 2016), available online at www.sinnfein.ie/files/2016/The_Case_For_The_North_To_Achieve_Special_Designated_Status_Within_The_EU.pdf; *ibid*, *Securing designated Special Status for the North within the EU* (Belfast/Dublin: Sinn Féin 2017), available online at https://www.sinnfein.ie/files/2017/BrexitMiniDocs_April2017_Final.pdf; Social Democratic and Labour Party. *Securing our future in Europe* (Belfast: Social Democratic and Labour Party 2017), available online at www.newry.ie/attachments/article/4720/eustatus.pdf.

³ C. Gallagher and K. O’Byrne. *Report on How Designated Special Status for Northern Ireland Within the EU can be Delivered* (Doughty Street Chambers, London) Policy Department for Citizens' Rights and Constitutional Affairs 2017, available online at www.doughtystreet.co.uk/documents/uploadeddocuments/NI_Special_status_report_161017_FINAL.pdf.

⁴ For an overview of loyalist ambivalence post-1998 towards relations with those regarded as ancient foes, see for instance Roger Mac Ginty, *Unionist political attitudes after the Belfast Agreement*, *Irish Political Studies* 19, (1) Summer 2004, pp. 87-99; and James W. McAuley, *Whither New Loyalism? Changing Loyalist Politics after the Belfast Agreement*, *Irish Political Studies* 20 (3) September 2005, pp.323-340.

resistant than favourable towards anything that might further loosen the constitutional bonds and fabric of a British polity already, in the aftermath of the Scottish independence referendum (2014), confronted by existential challenge from resurgent Celtic nationalism.

The Irish border issue has nevertheless prompted some creative constitutional thinking about future relations between the territorial nations that consists the United Kingdom. Amongst these revisionist ideas is the so-called 'Dalriada' project, whereby England and Wales (where majorities voted for Brexit) would leave the EU, but Scotland and Northern Ireland (whose voters opted to 'remain') would retain at least some degree of membership.⁵ This radical proposal has met with outright hostility, and not merely from Brexiteers on the mainland for whom both the present British constitution and the economic integrity of the United Kingdom as a single market are sacrosanct, and in no way open to negotiation. Northern Irish unionists are likewise averse to constitutional tinkering that threatens what they see as their umbilical cultural connection with and political lifeline to the mainland, and for whom any such radical constitutional design is merely insidious conspiracy intended to deprive them of their historic destiny to remain an integral part of the British State.⁶

(ii) Competing designs for border 'backstops': The prospect of reconfiguring Britain's constitutional arrangements is seen altogether differently on the EU side. Separating Northern Ireland from mainland Britain, if only for the relatively benign purpose of softening the material consequences of Brexit for all concerned, remains the EU negotiators' preference for resolving impasse on the border issue. Dismissed out of hand by the British Prime Minister in talks in Brussels in December 2017 that concluded the first phase of negotiations, this chimerical proposal reappeared unilaterally and without warning in the EU27s final draft statement on the withdrawal terms.⁷ A caveat inserted by the European Council as *quid pro quo* for its willingness to extend the time frame for the United Kingdom's final exit, from March 2019 to December 2020. Clear insistence by Brussels, but after the fog of confusion cleared wholly unacceptable to London, although its eventual inclusion in 'agreed' terms for withdrawal is clear indication of which party has the greater leverage in these negotiations. Indeed, the fact that this idea is still currency in Brussels confirms London's meagre influence over the eventual terms. Unless of course the United Kingdom decides to cease negotiating and exits unilaterally without any 'deal' in place, a strategy advocated however only by incorrigible Brexiteers.

The joint report signed by all parties to conclude the first phase of what are sequenced negotiations perpetuated the convenient ambiguity between the respective sides, identifying

⁵ Brendan O'Leary, 'The Dalriada Document: Towards a Multinational Compromise that Respects Democratic Diversity in the United Kingdom', *The Political Quarterly*, 87 (4) 2017, pp.518-33.

⁶ Lisa O'Carroll, 'Arlene Foster hits out at Michel Barnier over Irish border',

DUP leader says Brexit negotiator does not understand Northern Ireland's unionist culture, *The Guardian* (London), 30 April 2018, available online at <https://www.theguardian.com/uk-news/2018/apr/30/dup-arlene-foster-hits-out-at-michel-barnier-over-irish-border>.

⁷ Rowena Mason, 'Main points of agreement between UK and EU in Brexit deal', *The Guardian* (London), 8 December 2017, available online at <https://www.theguardian.com/uk-news/2017/dec/08/main-points-of-agreement-uk-eu-brexit-deal>.

on the EU's insistence three options. An option A: a 'solution' to the border question resulting from comprehensive agreement on all outstanding matters. An option B for an unspecified 'bespoke' arrangement; whereas option C is the contentious proposal for a so-called 'back-stop' that ensures a soft border in the event of negotiations completely breaking down and with full regulatory alignment on both sides of the border. A 'solution' that at least implies some degree of functional and for its critics, constitutional separation of Northern Ireland from the rest of the United Kingdom: for trade, product and other regulatory standards, tariffs and customs arrangements, but subject to EU legal jurisdiction.⁸

Predictably, unionists whether in Northern Ireland or mainland Britain resist this option as unwonted, seeing it through the distortive prism of history as tantamount to relocating the border in the Irish Sea and a threat to the very idea of the Union State.

How feasible are proposals for relocating the Irish border, if only for administrative purposes? Arrangements already exist, notably between the United Kingdom and France for repositioning Britain's 'border' under the terms of the Le Touquet Treaty signed in 2003 by Prime Minister Tony Blair and President Jacques Chirac.⁹ This protocol was a response to particular and pressing circumstances, whereby Britain had become a destination of choice for thousands of non-EU migrants, many without legal status or moral entitlement as asylum seekers to reside in Britain. Accordingly, Eurostar rail and seagoing passengers at the Channel ports technically 'depart' the United Kingdom and enter France (and Belgium) at the British border in Eurostar's London terminus, and for incoming passengers at termini in Paris and Brussels respectively. There is no technical reason that prevents similar arrangements at the Anglo-Irish border, relocating requisite administrative checks to ports such as Liverpool, or indeed any other British and Irish airport, port or ferry terminal. Not technical barriers as such, but certainly political objections in view of visceral politics in the governing Conservative Party, where many parliamentary members and activists see control of the border as emblematic of an inalienable and indivisible sovereignty. For many Northern Irish unionists too the 1921 border remains a potent symbol of their British allegiance, less administrative demarcation than incontrovertible history and political fact. A cultural and for some even an ethnic border, something more meaningful than a merely a geographical marker, a political line drawn on a map between neighbouring jurisdictions. Rather, a border freighted with existential meaning about ontological identity, indeed the sort of reflexive primordialism that rallied behind Brexit during the referendum campaign.

Common sense and practical solutions can only go so far, make no convincing response to the deeply embedded affective sentiments that drive identity politics. Especially so in Ireland where historical memory and sectarian politics transcends 'mere' reason, retains potency as the primary and for many remains as the primordial determinant of political attachment and

⁸ Lisa O'Carroll, Ireland warns of perils of failing to agree Brexit 'backstop' solution on border, *The Guardian* (London), 16 April 2018, available online at <https://www.theguardian.com/politics/2018/apr/16/ireland-warns-of-perils-of-failing-to-agree-brex-it-backstop-solution-on-border>

⁹ *Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the Implementation of Frontier Controls at the Sea Ports of both Countries on the Channel and North Sea*, Le Touquet, 4 February 2003, Command Paper 6172, available online at <https://treaties.fco.gov.uk/docs/pdf/2004/TS0018.pdf>.

cultural identity. This is not to suggest that ultra ‘loyalists’ in the Democratic Unionist Party, who at the outset opposed the Belfast Agreement, are now so resistant to the material advantages accruing from the peace process as to want it revoked. Nevertheless, unionist acceptance of the patent benefits from cross-border and even inter-communal co-operation in no way implies readiness to abandon reflexive tribalism, to commit unequivocally to the peace process regardless of the consequences for retaining their political allegiance and cultural connections with the rest of the United Kingdom. For these reasons, the peace process remains as much hostage to embedded cultural allegiances as it always has been. That said present disagreement between the Northern Ireland parties on the future of the border is now much less about ends than means. A question of *how* rather than *whether* to agree appropriate means for maintaining a permeable border, and to do so by maintaining peaceful engagement that is the principal legacy of the 1998 accord.¹⁰

The proposal to relocate the border according to the EU’s proposed ‘back-stop’ remains on the table, if only as a last resort should there be no agreement between EU / UK negotiators during the coming endgame. Meanwhile, Dublin has complained that the British Government has failed to make any detailed, let alone convincing response to the ‘backstop’ it maintains Theresa May accepted during the December 2017 European Council that completed the first stage of these negotiations. A proposal for addressing the border issue, endorsed by EU27 and iterated in the final communiqué as an agreed position between the parties, at least until London comes up with a feasible alternative. Between December 2017 and summer 2018 something of the intent of the earlier Council deliberations somehow got lost in translation; either that or conveniently forgotten in London. With the United Kingdom refusing thereafter to confirm Brussels’ interpretation, insisting that all it had signed up to was hypothetical ‘solutions’ as yet unspecified, for avoidance of a hard border in Ireland should current negotiations founder. British interlocutors continue to refute Brussels’ rigid interpretation of ‘backstop’. In as much as London even acknowledges the terminology, it prefers a narrative of events that accords with the British national interest. ‘Backstop’ designed not as reassurance for the Irish on either sides of the border, but as merely ‘sensible’ precaution for the United Kingdom against a ‘cliff-edge’ Brexit. An interim arrangement, and time limited insurance against a ‘no deal’ outcome, whereby the United Kingdom per se and not just Northern Ireland will continue to commit to those limited aspects of the Customs Union necessary for maintaining a permeable Irish border, until alternative arrangements are in place.

EU27 on the other hand, interprets the idea of a post-Brexit backstop quite differently, not as insurance for the United Kingdom but as a guarantee of the only reliable peace process in Ireland. As such, an arrangement applying only to the Irish border and not to the entire EU / UK border, and unlike the British version one without time limit. Accordingly, Northern Ireland in this interpretation would remain fully aligned to the EU’s customs territory, the

¹⁰ *A Vision for Northern Ireland outside the EU*, Ulster Unionist Party, (UUP Belfast 2016); See also Ireland post-Brexit: Put asunder, *The Economist*, 2 July 2016; and Aidan Stennett, ‘The EU referendum and potential implications for Northern Ireland’, Northern Ireland Assembly Research and Information Service Research Paper, NIAR 2016, pp.32-16.

VAT regime and within a single market for goods. Moreover, EU negotiators insist that a ‘backstop’ can only accommodate British insistence on Brexit ensuring avoidance of a hard border in Ireland by establishing two quite distinct customs regimes. One that applies exclusively to the whole of the island of Ireland with a United Kingdom / whole of Ireland border in the Irish Sea, the other solely to Great Britain. In response to insistent lobbying by Dublin for greater clarity on the border situation, the EU unilaterally translated the ad hoc arrangement, ‘agreed’ as they see it at the December 2017 European Council, into a legally binding international protocol. A predictable, and according to the EU interpretation of events a reasonable response, though one that conflicts with the Conservative Party’s historical commitment to maintaining the constitutional integrity of the ‘union state’.

Recent events have merely reinforced British intransigence over an outcome that presents the Government with a serious predicament. On the one hand, to accept the Brussels hard ‘backstop’ option that challenges the constitutional integrity of the British State: or instead, to go with an arrangement for future trade that means remaining in something very like the existing customs union. In order to avoid what to them are both unpalatable outcomes, hard Brexiteers in Parliament inserted amendments to the Customs Bill that make any such ‘backstop’ illegal under United Kingdom law, and by doing so sabotaging the prospects for any form of residual customs arrangement. By way of response, the Government with no majority of its own chose political survival over logic and accepted the amendments. In a speech delivered in Belfast in July 2018, Prime Minister May has repeated her principled opposition to what she has always dismissed as the EU’s “unworkable” backstop. On this occasion, not merely in terms of self-interest but by invoking convenient principle, proclaiming in patriotic language intended to appeal to Ulster unionists and Brexit nativists alike that any such barrier erected between Northern Ireland and Great Britain would leave the people of Northern Ireland “without their own voice” in trade negotiations. In her preferred narrative, a democratic deficit that both breaches the Belfast Agreement and subverts the British Constitution.¹¹

For its part, the EU has inverted this convenient and ‘principled’ British interpretation of its proposal, continuing to make its agreement to a withdrawal arrangement with the United Kingdom conditional on the latter’s acceptance of Brussels version of ‘backstop’ and deemed by its negotiators to be the only reliable guarantee of a ‘soft’ border in Ireland. For this very reason, and should no mutually agreed solution be found to the border imbroglio the British Government, caught as it is between quite different and contending claims of what is in Ireland’s best interests, is rather more likely than not to walk away from these negotiations without an agreed deal on future relations with the EU. In effect, preferring the vicissitudes of

¹¹ Lisa O’Carroll, Theresa May: I will never accept EU’s idea on Irish Brexit border, *The Guardian* (London), 19 July 2018, available online at <https://www.theguardian.com/world/2018/jul/19/theresa-may-i-will-never-accept-eus-ideas-on-irish-brexite-border/>.

‘crashing out’ of the EU to agreeing to something that might accelerate what it fears could be the break-up of Britain.¹²

(2) BESPOKE ARRANGEMENTS, HYBRID SOLUTIONS

The British government’s preference throughout these negotiations has been for what the Prime Minister has described as a ‘bespoke’ arrangement for future trade relations with the EU that will avoid a hard border with the EU27, and not least Ireland. An arrangement that precludes complete rupture of present relations, without ceding any residual control over, or permitting undue interference from Brussels in the United Kingdom’s ability to sign trade deals with third parties. Any such arrangement has been resisted thus far by EU27 interlocutors, who object to what they describe as ‘cherry picking’, or in another edible metaphor as ‘having cake and eating it’. One such example is a British proposal to include UK-based financial services in a special services arrangement, permitting British banks, brokerages and finance companies to participate in aspects of the Single Market in services, but with only nugatory regulatory control exercised by European institutions.

Such an arrangement would allow United Kingdom financial services a ‘passport’ to trade in the lucrative EU financial services market on much the same terms as those currently enjoyed by the city of London. Whilst at the same time exempting the United Kingdom from meeting the customary obligations that come with EU membership, not least acceptance of free movement being subject to the juridical powers of the ECJ, or continuing regulatory oversight, by the Commission. Hardly surprisingly, the EU has refused any such privileged bespoke arrangement. British negotiators meet resistance on this from Brussels, and although setting aside the original and altogether more ambitious proposal for mutual recognition of financial services British ministers continue to propose variants of hybridity, arrangements variously described as ‘enhanced regulatory equivalence’. Amongst which proposals is a special ‘customs arrangement’ based on the model already used by third countries in order to allow access to the EU market in financial services.

This pitch for even limited special treatment was predictably rejected by Michel Barnier, on grounds that it would deny EU27 decision-making autonomy in this important market-place, thereby “violat(ing) the principle that access rights to the bloc’s financial services market are a gift from Brussels that can be freely withdrawn.”¹³ This latest British proposal for managing the financial services sector would, as Brussels sees it, amount to condoning joint governance, a “system of generalised equivalence that would in reality be jointly run by the EU and UK”, and unacceptable because it would preclude the EU withdrawing UK access to

¹² Marley Morris, To break the Irish backstop deadlock, May needs her biggest fudge yet, *The Guardian* (London), 20 July 2018, available online at <https://www.theguardian.com/commentisfree/2018/jul/20/irish-backstop-brex-it-fudge-theresa-may-chequers>.

¹³ Barnier interview cited by Jim Brunsden, Brussels rejects UK’s financial services Brexit plan, *Financial Times* (London), available online at <https://www.ft.com/content/0df20cc6-8c43-11e8-b18d-0181731a0340>.

its financial services should it wish to do so.’’¹⁴ The British Government likewise faces contra objections from domestic critics to its median proposals for future trading relations with the EU, on grounds that these would permit continuing jurisdiction over national policy by European institutions, notably the Court of Justice. A situation that places the British Government uncomfortably between the ‘rock’ that is Brussels, and the ‘hard place’ that is insistent nativism from within its own party ranks. As sovereigntists see it, ‘taking back control’ of the border, uncoupling from ‘fortress Europe’ in order to negotiate bilateral trade agreements on the global stage permits no compromise whatsoever with classic Tory ideas about statecraft and nationhood.¹⁵ The standoff here is between liberal internationalism exemplified by the ‘community method’ with its ‘four freedoms’ and ‘pooled’ sovereignty, and an extreme Brexit that demands exclusive sovereignty *sine die*. A quandary that the British Government has confronted, but to date by no means resolved throughout these negotiations, and one precisely captured by the conundrum of the Irish border.

(i) Associate EU status exclusively for Northern Ireland: Something between ‘solutions’ *in extremis* as outlined above and the avoidance of a ‘hard’ border remains as the Government’s preferred outcome to this conundrum. Whether this is attainable however is doubtful, as continuing negotiations have failed to resolve impasse. Numerous proposals from British negotiators for ‘minimising disruption’ to current free-flowing transit arrangements at the EU / United Kingdom border, all of them based on the premise that Northern Ireland will remain at least in some functional matters in close association with the EU, have failed to answer EU objections. What these various median proposals have in common is the intention to reassure the Europeans that ‘sensible’ or ‘practicable’ arrangements at the border can be found that will minimise disruption, facilitate continuing trade and transit, not least across the Irish border and that are compatible with everyone’s ‘red lines’.

The EU negotiators dismiss this as merely fanciful, and counter with quite different ‘solutions’. Amongst proposals from Dublin, supported by EU27, is for Northern Ireland rather than the United Kingdom per se to remain an associate member of the Single Market. To retain its membership of the European Economic Area, an arrangement that would permit free movement of goods, services, capital and people, thereby giving businesses in Northern Ireland continued access to public procurement contracts throughout the EU, and especially in the Republic, its principal market for this type of trade. A proposal too that after subsequent adjustment by EU negotiators, eventually became its preferred version of ‘backstop’. Something like this arrangement would, Brussels maintains, alleviate anxiety amongst border communities about loss of EU rights and negative consequences for economic prospects, both significant elements of the Belfast Agreement.¹⁶ Northern Ireland

¹⁴ Brexit refresh: Aiming for equivalence, RBC Investor and Treasury Services, June 27 2018, available at https://www.rbcits.com/en/insights/2018/06/brexit_refresh_aiming_for_equivalence.

¹⁵ Alan Clarke, *The Tories: Conservatives And The Nation State, 1922-1997: Conservatives and the Nation State, 1922-97* (Orion Books, London, 1998).

¹⁶ B. Doherty, C. McCrudden, L. McGowan, D. Phinnemore, D. Schiek, and J. Temple Lang, *Northern Ireland and Brexit: the European Economic Area option* (European Policy Centre, Brussels 2017), available online at https://epc.eu/pub_details.php?cat_id=17&pub_id=7576, at p.39.

would thus continue to participate in those EU programmes that have signally contributed to the peace process. These are, *inter alia*: cross-border co-operation on environmental matters, accessing EU financial and programmatic support for initiatives in tourism, public health, and not least police and judicial co-operation, including participation in the European Arrest Warrant scheme, access to EU data-bases on criminal intelligence, and the Erasmus programme for student mobility.

The British response to this proposal has been less than positive, merely reiterating familiar assurance that in the event of failure to agree a mutually comprehensive free trade arrangements between the EU and the United Kingdom, Northern Ireland would have the ‘right to decide’ whether to follow United Kingdom or EU rules in cases of future regulatory divergence. This response merely adds confusion to what is an already convoluted situation. Not least, because admittedly oblique references from British officials to the effect that a resolution of the border conundrum might necessitate differential arrangements for Northern Ireland conflict with frequent British assertions that the eventual outcome ‘will’ in no way contravene the fundamental constitutional principle that Northern Ireland remains an ‘integral’ part of the British State.

(ii) Customs partnership: The principal drawback of any ‘hybrid’ solution is its inaptness for avoiding a ‘hard’ border. For without the Province’s continued membership of the customs union, reinstatement of customs controls and border checks will be unavoidable, regardless of regulatory, standards, trade and customs arrangement eventually agreed or for that matter not agreed. A further proposal from the British Government, and the preferred option of the Prime Minister and those in her Cabinet who want to stay as closely aligned to the EU’s customs union as possible after Brexit, is variously and vaguely described as ‘a new customs partnership’, and in its latest format as a ‘customs arrangement’. An official statement issuing from London affirmed this proposal as an intention to align “our approach to the customs border in a way that removes the need for a UK-EU customs border”.¹⁷ A key aspect of this particular hybrid ‘solution’ is that the United Kingdom shall “mirror(ing) the EU’s requirements for imports from the rest of the world where their final destination is the EU”, even obliging the United Kingdom’s customs service to collect and pass on duties at its borders on behalf of the EU.¹⁸

This controversial proposal was included in the so-called ‘Chequers Agreement’ intended to fix the ‘final’ British negotiating position, and proposed as a non-reciprocal arrangement. Only for pressure in parliament from militant Brexiteers to oblige the Government to accept in an amendment to its Customs Bill a reciprocal arrangement that would require the EU to likewise collect tariff and dues at its own border on goods destined for the United Kingdom. The original un-amended proposal was already unlikely to survive detailed scrutiny and

¹⁷ Future *customs arrangements*. A *Future partnership Paper*, HM Revenue and Customs, 15 August 2017, p.2, available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf.

¹⁸ Ibid.

further negotiation with the EU. The amended version is certainly doomed to fail, principally because it conflicts with the EU's fundamental principle of being a singular market with uniform tariffs applied at its borders; but also because members subscribe *tout court* to the diplomatic axiom that no legitimate international actor can permit another sovereign body to act as its agent, certainly not for revenue collection. Even in the unlikely of circumstances that agreement on unilateral British collection and redistribution of EU duties might be achievable in principle, customs' experts maintain that the system of variable duties would take years to properly implement, and even then be too complicated to operate.

The principal complaint from Brexiteers here is much less about technical complexity than their suspicion that any such an arrangement is intended to keep the United Kingdom within the EU's legal ambit, and especially to remain under the jurisdiction of the European Court of Justice and subject to the EU legal order. As such, compromising not only 'indivisible' national sovereignty but the prospect too of negotiating bilateral trade agreements with third parties. An arrangement one Brexit ideologue has described as akin to being a 'vassal state', and another just as disparagingly as remaining as an EU colony.¹⁹ Neither of these hybrid arrangements so far proposed by British negotiators as prospective solutions for managing British trade with the EU post-Brexit, and particularly for resolving the Irish border question has even found consensus in the British Cabinet. Meanwhile, EU27 negotiators have responded to what they see as confusion in British ranks by claiming neither proposal, nor even a conflation of both is remotely feasible, and peremptorily dismissed as such by EU chief negotiator Michel Barnier as merely illusory, 'smoke and mirrors' diplomacy. His response, for instance, to British proposals for the border issue published in August 2017 was polite but blunt, asserting that, "what we see in the UK paper is a lot of magical thinking about how an invisible border would work in the future.... if you look at the Irish paper, it is very good on aspirations but it is short on workable solutions."²⁰ One diplomatic source close to the action described Brussels' response to these various offers from London as suffering systematic 'annihilation' after "a detailed and forensic rebuttal (in which) it was made clear that none of the UK's customs options will work. None of them".²¹

The opposition Labour Party has proposed its own variation of a more formal customs arrangement, as have many trade unions and business interests. To acknowledge the 'will of the people' as expressed in the referendum by leaving *the* customs union, replacing full Membership with an as yet unspecified form of *a* customs union based on continuing EU / UK regulatory alignment. An arrangement Labour spokespersons hope will somehow

¹⁹ Steven Poole, What is a 'vassal state'? Jacob Rees-Mogg's mid-Brexit vision explained, *The Guardian* (London), 2 February 2018, available online at <https://www.theguardian.com/books/2018/feb/02/word-of-the-week-steven-poole-vassal>; and Boris Johnson's resignation letter 9 July 2018 at https://twitter.com/BorisJohnson/status/1016373750395277313/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1016373750395277313&ref_url=https%3A%2F%2Fwww.belfasttelegraph.co.uk%2Fnews%2Fuk%2Fpms-plan-for-brexit-would-leave-the-uk-like-a-colony-of-eu-says-boris-37097155.html.

²⁰ Jennifer Rankin, UK accused of 'magical thinking' over Brexit plan for Irish border, *The Guardian* (London), available online at <https://www.theguardian.com/uk-news/2017/aug/25/uk-accused-of-magical-thinking-over-brexit-plan-for-irish-border>.

²¹ Peter Foster, EU rejects Theresa May's Brexit Irish border solution as doubts grow over whether UK can leave customs union, *The Telegraph* (London), April 19 2018, available online at <https://www.telegraph.co.uk/politics/2018/04/19/exclusive-eu-rejects-theresa-mays-brexit-irish-border-solution/>.

circumvent familiar accusations from Brussels of ‘cherry picking’.²² In spite of significant differences of detail, both major British parties remain ideologically conflicted, and no less internally divided on the issue of future trade relations with the EU and the consequences of this for the Irish border. Both parties too, propose some variant of ad hoc arrangement that will seemingly maintain the benefits accruing to the British economy of the present customs arrangement, whilst accommodating the peremptory demand of those who voted for Brexit to recover sovereign autonomy in negotiating free-trade arrangements with third (non-EU) countries.²³

The intention behind these median fixes is political as much as practicable: to find a convenient way to square the circle of a ‘soft’ border in Ireland, whilst simultaneously according with domestic political expectations for a meaningful Brexit that ‘takes back control’ of borders and recovers sovereignty, albeit with only minimal disruption to current trade flows. On the evidence of the negotiations to date, these are less than convincing, let alone deliverable fixes and are criticised as such by Brussels, whose frequent rebuke is of self-interested ‘cherry picking’. Whether in light of these objections a post-Brexit arrangement is likely, whereby Northern Ireland retains at least notional membership of the present or some variant of customs union, and in a manner that accords with the cultural preferences of the loyalist community, will depend on politics as much as on legal artifice. Willingness all round, but especially amongst those people on the ground in Northern Ireland to accept compromise, a trade-off between continuance of peace and stability and procedural accommodation that alters the Provinces constitutional relations with the mainland short of constitutional rupture. And no less crucially, a solution to the border conundrum that requires an unwonted outbreak of plain common sense on the part of the British Government to put prudence over merely wishful thinking!

These median solutions certainly avoid so-called ‘red line’ objections by unionists everywhere that the United Kingdom is and must remain a singular and historic political and constitutional entity, recent devolution notwithstanding. Or at least they do ‘on paper’ as exercises in academic serendipity. Nevertheless, as we shall see below the case for such a median outcome and one frequently made by British negotiators has been less than persuasive as an exercise in practical politics. Whether to EU counterparts, by persuading them that the United Kingdom is fully cognisant of their own ‘red lines’ on the singularity of the Single Market and its legal and regulatory order. Or to trenchant Brexiteers implacably opposed to what they see as the prospect of constitutional vandalism, should any concessions be made on the management of the UK / EU border, and not least in Ireland. The consequences however of resisting any such concessions are patent. The dislocation of trans-border commerce, dilution over time of regulatory harmonization, disrupted social political and civic co-operation, are all likely casualties of anything other than the ‘softest’ Brexit: consequences that might be averted or at least lessened by the United Kingdom remaining

²² Peter Walker, UK will have to have a customs union post-Brexit, says Corbyn, *The Guardian* (London) 20 February 2018, available online at <https://www.theguardian.com/politics/2018/feb/20/uk-will-have-to-have-a-customs-union-post-brexit-says-corbyn>.

²³ Editorial: The Guardian view on Brexit and the Irish border: alchemy fails again, *The Guardian* (London), 20 April 2018, available online at [The Guardian view on Brexit and the Irish border: alchemy fails again](https://www.theguardian.com/politics/2018/apr/20/brexit-irish-border-alchemy-fails-again).

within the EU Single Market and Customs Union. An outcome too that would ensure continuing participation by Irish stakeholders in those EU programmes that have contributed so much to the normalisation of political relations, and to fostering however conditionally cultural accommodation, if not quite outright reconciliation between communities in the North and on either side of the Irish border. A stark choice is to be made and presumably a rational calculus of likely outcomes. Except that in politics, plain common sense and ideological preferences are by no means easily reconciled, and so it has proved in this case. The British Government's determination to deliver what it considers as a mandate from the electorate and Brussels insistence on the integrity of the Single Market seemingly precludes agreement on the type of hybrid solution that might just resolve the Irish border conundrum for all concerned.

(iii) 'Regulatory alignment' and 'standards equivalence': Verbal adroitness, diplomatic finessing and creative thinking are currently being utilised in framing bespoke, undogmatic and imaginative fixes for the border predicament. Not least by the British government, and intended to complement their offer, described in one such formulation as 'maximum facilitation' (see also (iv) below). This particular approach to problem solving has firm ontological roots in the British administrative tradition as cultural narcissism, a claim to national exceptionalism that conveniently synergises assumed instinctual common sense and liberal pragmatism over the rank ideology and rigid bureaucratisation that again supposedly characterizes the practice of public policy and conduct of governance in Continental Europe.²⁴ An application of practical administration combined with 'creative thinking', a natural 'genius' for pragmatic compromise intended in this expedient formulation to preserve as much post-Brexit complementarity as possible between the United Kingdom and EU in trading goods, services and in the regulatory norms and technical standards essential for these transactions.

On one level, common sense commends this narrative. After all, at the moment of United Kingdom's withdrawal from the Union, complete alignment will exist between the United Kingdom and EU27 on every matter pertaining to regulatory and standards requirements, the legacy of the United Kingdom's assimilation of the *acquis communautaire* over forty-six years of membership. Regulatory proximity is a persistent theme of the British Government's anticipatory response to Brexit. The European Union (Withdrawal Act) 2018 has already incorporated into the United Kingdom Statute Book the present *acquis*, some twenty thousand elements of current EU law, and including rules on regulatory standards.²⁵ Transposing this corpus of law transfers responsibility for the jurisdiction and adjudication from EU law and institutions to the British Parliament, courts and standard-setting agencies,

²⁴ See for instance the discussion of John Stuart mill's liberal empiricism in Simon Glendinning, *The work of J.S. Mill* shows the danger in eliminating the differences between European nations, available online at <http://blogs.lse.ac.uk/europpblog/2013/09/30/the-work-of-j-s-mill-shows-the-danger-in-eliminating-the-differences-between-european-nations/>.

²⁵ European Union (Withdrawal) Act, 2018, available online at http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf.

and accords with the ‘red line’ that affirms the supremacy of British over European law.²⁶ In practical terms, however, the principal consequence of this legislation is to establish parallel, and at the point of departure quite separate if complementary legal orders and regulatory regimes: transposed for the time being as a proximate legal and regulatory order, although we might reasonably surmise likely to maintain such complete complementarity for how much longer? This assimilative stratagem has little to do with British reticence about diverging too far from EU regulatory arrangements or jurisdiction. It is rather more a convenient legal device, an interim and practical solution establishing a continuous and comprehensive legal order that replicates the economic and related functions of its former EU membership in order to avoid a regulatory black hole at the point of departure.

The intention here is to avert a regulatory void or juridical lacuna in the immediate aftermath of Brexit. For that very reason a merely precautionary and functional response to the clear political trajectory that is driving Brexit, whose imperative is full recovery of what its supporters claim is the ultimate ‘prize’ of national sovereignty. To shadow the EU’s regulatory order during an uncertain and unpredictable transition period, but to do so as a sovereign preference and entirely in the national interest that in no way compromises the intention for Brexit. The Government’s preferred strategy here has shifted in the course of the negotiations from proposing full ‘alignment’ of regulatory standards to merely ‘equivalence’. An indication of determination in Conservative Party ranks to disengage as soon as is feasible from the EU regulatory order. To do so on Britain’s own terms and in the national interest as the party chooses to define it, reclaiming the prerogative for future British governments to adapt and if necessary to rescind EU product and other technical standards and procedures. But also an indication of the resistance from Brussels to a hybrid alternative to present arrangements that might signal a weakening of its own red line on the singularity of its market. Clear evidence then from both sides of the centripetal dynamic that is both driving Brexit and the EU’s response to it: and over time certain to widen the regulatory hiatus between the United Kingdom and its former EU partners.

The logics here are predictable enough. Future trade arrangements between the United Kingdom and third parties will surely dilute the present normative ‘fit’. Not least because the bilateral trade treaties the United Kingdom is looking to negotiate with global partners will more often than not result in positive-sum bargains that normally require compromise and concessions on standards and regulations by the party with the least bargaining heft. The party with most economic heft in any such bi-lateral negotiations is always likely to impose its own regulatory standards as a requirement for closing the deal. We might recall here the words attributed by Thucydides to the Athenian envoys to Melos in the course of the Peloponnesian war, that: “since you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must”.²⁷ The logics of the United Kingdom’s future engagement with the

²⁶ See European Union (Withdrawal) Act, 2018: Explanatory Notes, published by the Department for Exiting the European Union, available online at

http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf.

²⁷ Thucydides, *History of the Peloponnesian War*, Chapter XVII, The Melian Conference.

world's economic super-powers, whether the USA, China and other prospective trade partners suggests that the *demandeur* in these negotiations will more often than not be Britain.

What the British Government for its own political purposes continues to assert will be straightforward and reciprocal bargains, replacing trade lost due to changed relations with the EU and replaced by bilateral deals with global partners, is likely to be anything but straightforward. Trade bargains are always hard-driven, prospective partners seeking to impose their own conditions and prioritise their own interests. This much is clear from recent events. The 'common rule book' that features in the latest variant of Britain's hybrid 'customs facilitation' arrangement after the 'final' attempt by Theresa May to unite the Cabinet around an agreed position was immediately denounced by Donald Trump as inimical to what this master of transactional bargaining and the art of 'the deal' prefers as an exclusively 'America First' diplomacy. The American president was predictably dismissive, signalling or rather 'tweeting' his instant disapproval of the British proposal for continuing a common regimen of trade rules between the United Kingdom and EU, rejecting it as a certain deal-breaker for his idea of an acceptable USA / United Kingdom deal on trade. A president who insists on bilateral transactions over positive sum multilateral bargains for conducting international relations, objected to London's latest hybrid proposal to Brussels on ideological as much as on merely pragmatic grounds. The fact that the United Kingdom could even contemplate conforming to EU standards, whether on food safety, environmental requirements and much else besides, agreeing to altogether more intrusive and technically rigorous rules than those required by America's regulatory regime, confirms that even post-Brexit, the United Kingdom will likely remain, as Trump sees it, within the EU's statist orbit.²⁸

Some commentators take a rather more sanguine view of likely outcomes here, maintaining that regulatory alignment need not apply to EU / UK economic relations in their entirety, to every product or service. Their case is that some degree of regulatory alignment might be possible, but only where it is in the mutual interests of all parties and required for maintenance of a 'soft' border in Ireland. One such proposal is to limit regulatory alignment only to EU / Northern Ireland trade, and then only in those areas of economic activity that are critical for cross-border trade between the Republic and the North: notably for sanitary and phytosanitary regimes, in plain language applying to rules that ensure food safety and animal and plant health standards. Even if this was feasible in principle, doubts remain on the EU side about the workability of such complex and variable arrangements. Politics as much as common sense logics will determine the future direction of policy on a matter for which there are no straightforward, let alone a simple solution.

This brief overview of the challenges that Brexit raises for future management of the principal EU / UK border in Ireland connects by extension to the particularities of security

²⁸ Ben Riley-Smith and Gordon Rayner, Donald Trump warns Theresa May a soft Brexit will kill any trade deal with the USA, *The Telegraph* (London), 13 July 2018, available online at <https://www.telegraph.co.uk/news/2018/07/12/donald-trumps-visit-uk-president-arrive-theresa-may-pushes-post/>.

and border management elsewhere at the EU / UK border. What the situation in Ireland does confirm is that difficulties are altogether more apparent than viable solutions. None of the hybrid British ‘offers’ that have featured so far in these negotiations and summarised above, satisfies the respective, quite different and even conflictual requirements of the parties to these negotiations. Reassurances issuing from London about maintaining commitments and obligations with regard to extant security and intelligence networks are often reiterated in official ministerial pronouncements, for instance continuing British participation in Europol, the European Arrest Warrant and Euro-just, all aspects of what is officially described in positive terms as a ‘new security partnership. An arrangement intended to ensure continuing and harmonious political relations after Brexit, and the corollary of commitment to resolve the Irish border issue and safeguarding the peace process, principally by avoiding any hindrance to trade, commerce and those flanking political and security arrangements that are the legacy of the peace process and guaranteed by the Belfast Agreement.

The situation on the ground however is altogether less straightforward let alone reassuring for the peace process, with power sharing currently in abeyance and the principal parties resorting to familiar intransigence. Even so, none of the principal players has yet called time on the peace process, though Brexit is a serious challenge to a settled politics that since 1998 has mostly consigned ‘The Troubles’ to folk memory. At the same time, both communities continue to define their preferences for a ‘mutually satisfactory’ resolution of the border predicament through quite different lenses, each side seeing events whether past or present through prisms that reflect quite different histories, adversarial politics, exclusive cultural identities, and still shaped by discrepant ideas about the meaning of ‘communal’ interests in this factious land. In the end, and notwithstanding fully two decades of unprecedented peace and reconciliation, culturally embedded identities remain mostly intact and visceral instincts rooted in ancient prejudices continue to shape present politics.

(iv) The technological ‘fix’?: A less politically contentious although equally problematic ‘solution’ to the border management issue is the so-called technology ‘fix’, which the British Government put forward in its official position paper on future customs arrangements. One of two distinct yet closely related proposals for avoiding a hard border in Northern Ireland, facilitating the smooth transit of goods, and to a lesser degree services and people between the United Kingdom and EU27. This “‘highly streamlined customs arrangement” is described in official jargon as ‘maximum facilitation’ (max-fac), a procedure for ensuring continuing trade flows between the United Kingdom and EU27, but one that is some considerable way short of a comprehensive customs union. Accordingly, a smart digital arrangement “‘would aim to: continue some of the existing arrangements between the UK and the EU; put in place new negotiated and potentially unilateral facilitations to reduce and remove barriers to trade; and implement technology-based fixes making it easier to comply with customs procedures”’. As well as using advanced technology, this strategy would also permit exemptions from the usual customs checks for small businesses, and supposedly harness reciprocal ‘goodwill’ between authorities in both jurisdictions in order to circumvent hindrance caused by excessive formalisation at the border.

The intention here is to avoid reinstating an administratively problematic and politically contentious ‘hard’ border in Ireland, by operating ‘unobtrusive’ checks where possible away from the actual border, in order to fulfil London’s stated commitment to avoidance of a hard border. This would involve “‘utilising the UK’s existing tried and trusted third country processes for UK-EU trade, building on EU and international precedents, and developing new innovative facilitations to deliver as frictionless a customs border as possible.’”²⁹ Much is made by the British Government of the ‘successful’ technological arrangements in place at the Nordic border for ensuring rapid transit. Needless to say, the EU side has repudiated any such comparison as entirely misplaced, rebutting the technology fix combined with differential customs and tariffs and some degree of regulatory alignment as being impossibly complicated and hard to operationalise. Meanwhile, Brussels remains sceptical about the workability of such schemes given both their complexity and the lack of suitable technology for preventing illicit movement of goods and people from third countries into the EU market, via a permeable British border in Ireland.

Technological arrangements do exist and are in use elsewhere for facilitating efficient transit of goods and people across international borders, for example biometric passport and other security checks at airports, electronic scanning of vehicle registrations or cargo manifests in order to avoid unnecessary border delays. British advocates of an ‘electronic border’ regime make particular positive reference to arrangements at the Norway and Sweden border. A feasible solution or so it is claimed, for efficient and largely frictionless transit that might be used post-Brexit at United Kingdom-EU borders, and especially appropriate in Ireland. More critical voices nevertheless have raised objections to the technology ‘fix’ as unduly simplistic because administratively complicated, and refute the relevance of the Scandinavian comparison. The sheer scale and frequency of traffic flows at the EU / UK border (whether in Ireland or at the Channel ports) is greater by far than transit across the Nordic border, and not only for reasons of volume but because flows either way across that border are altogether less problematic. In part, this is because Norway as a Member of the European Economic Area is fully participant and legally compliant with the Single Market. In these circumstances, it is doubtful whether ‘merely’ technological fixes will suffice for managing a border burdened by factional history. Nor one a ‘solution’ that is capable of coping with the challenges of policing a complicated geography, with innumerable official and many unofficial entry / exit points. Challenge enough, even without the complications that accompany residual historical memory in Ireland. The sheer logistical difficulties of performing those checks required for monitoring mixed cargos of products and materials, and likely to be subject over time if not immediately to several and quite different tariff arrangements, regulations and technical and products standards.

The Irish border undoubtedly presents a unique challenge, although there are comparable if by no means exact difficulties in the post-Brexit transit of goods and people between Gibraltar and Spain. Greece and Cyprus too have signalled concerns, shared by Brussels, that

²⁹ *Future customs arrangements. A Future partnership Paper*, HM Revenue and Customs, 15 August 2017, p.2, available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf.

ambiguity over the state of the Irish border might set a risky precedent for relations with Turkey, or some other neighbouring non-Member States. Concern over Turkey appeared on the EU's political radar after London raised the 'green line' buffer zone that demarcates the border between Turkish and Greek Cypriot zones as a possible solution for Ireland.³⁰ Problematic too, if only for the density and type of traffic involved is how to monitor border transit between France and the United Kingdom: principally though not exclusively at the ports of Dover and Calais. All locations where lengthy delays will make port congestion, long tail backs of vehicles on approach roads unavoidable. More even than that heavy economic costs to be borne by business, local authorities and governments measured in terms of dislocation caused to regional economies and increased business costs and disruption to the cross border supply chains and Just-in-Time (JIT) or continuous flow manufacturing arrangements that characterise contemporary production processes. Adverse consequences from even short delays at the border have persuaded some manufacturing enterprises to resort to precautionary measures, buying in emergency stocks of spare parts and raw materials: arrangements that are no solution at all for perishable goods or short-shelf life products, most notably in the agricultural and food sectors. Some logistic companies are purchasing land for lorry parks, all sub-optimal measures that will add to business costs and impact negatively on productivity and competitiveness over the longer term. Stockpiling food and other perishables is of course another and more challenging matter entirely.³¹

These collateral issues confirm that the adverse consequences of setting up border controls between the United Kingdom and EU27 will by no means be confined to the border in Ireland even if historical precedent suggests that their worst political outcome is likely to occur there. To date, the British Government's hybrid offers on border management are rather more fanciful than feasible and especially problematic in the case of the UK / Irish border because offering no firm assurance to those who inhabit the region about avoiding the incipient threat to a still fragile peace.

HYBRID SOLUTION OR MERELY HYDRA? PROSPECTS FOR A BORDER OUTCOME

The 'known known' in the basket of uncertainties that is British withdrawal from the EU is the intentions of the Commission's negotiating team headed by Michel Barnier to ensure a withdrawal that maintains the integrity of the 'four freedoms', the mainstays of the Single Market. This uncompromising objective has remained the core of his negotiating strategy from the outset. The EU required that negotiations should be sequential: firstly, the so-called divorce settlement, finding agreement on mainly residual fiscal obligations and deemed

³⁰ Gordon Anthony, *Brexit and the Irish Border: legal and Political Questions*, A Royal Irish Academy –British Academy Brexit Policy Discussion Paper, British Academy / Royal Irish Academy 2017, available online at <https://www.britac.ac.uk/sites/default/files/BrexitandtheIrishBorderLegalandPoliticalQuestions.pdf>.

³¹ James Ball, *Stockpile food in the event of a no-deal Brexit?* Dream on, *The Guardian* (London) 26 July 2018, available online at <https://www.theguardian.com/commentisfree/2018/jul/26/stockpile-food-no-deal-brexit-dream-on>.

necessary for an orderly British withdrawal.³² Foremost here was the EU27 priority to ensuring continuing and appropriate British contributions to the EU's budget in lieu of commitments (pension liabilities, ongoing projects and programmes and the like) signed up to during its membership; secondly, to secure the rights of EU citizens resident in Britain after leaving the Union. Once these ex post facto obligations were settled attention turned to the even more contentious matter of agreeing the actual terms of withdrawal and future relations, not least future EU / UK customs arrangements and trade relations, and with the Irish border as proxy for the entire gamut of post-Brexit commercial and political relations. A critical issue in its own right for both side, but at the outset of the negotiations somewhat 'lost' in these other broader, and for the principals rather more pressing matters.

A familiar dynamic of even these early diplomatic exchanges was the lead British negotiator, Secretary of State for Exiting the European Union, David Davis together with Prime Minister May, proposing some variant of a bespoke arrangement, politely received by Barnier and just as graciously declined as infeasible, unworkable because crossing EU 'red lines'. What these British 'offers' mostly have in common, indeed the principal reason for their rebuttal is that each one according to EU interlocutors is framed almost exclusively in terms of British self-interest. A convenient narrative whereby the withdrawing from the Union and its common legal and regulatory obligations can somehow be reconciled with retention of those aspects of the membership that is in the national interest. Much less equitable 'positive sum' solutions to a common predicament for all parties than 'solutions' shaped first and foremost by London's preference for exiting the EU entirely on its own terms. A strategy disparaged if with courteous politesse by Michel Barnier as having 'cake and eating it'.³³

The EU response was no less selective in its own demands, and resisted as such by British interlocutors, arch Brexiteers, and traduced as 'arrogance' or 'bullying' by the nativist British media. A defensive narrative has developed in response to these EU rebuffs that sees the present impasse in negotiations as entirely the fault of Brussels for its refusal to compromise on 'reasonable' British proposals, even as malign intent by Brussels to punish the British for exercising their sovereign right to depart the club. Whatever the intentions of Brussels, the perception of intimidation from there is feeding nativist predilections in the United Kingdom. A mind-set that gives rise to a convenient alibi as 'offers' from London receive short shrift, and growing suspicion that Brussels will countenance no outcome that makes concessions to a country turning its back on the European idea. The 'logics' here are patent: that an 'easy' or mutually accommodating Brexit is impermissible precisely because it might encourage Euroscepticism and eventually 'exits' elsewhere. Some Brexiteers go further, seeing in

³² David Allen Green, The significance of the Brexit sequencing U-turn, *Financial Times* (London), June 20 2017, available online at <https://www.ft.com/content/c7923fba-1d31-39fd-82f0-ba1822ef20d2>.

³³ Slav Okov and Ian Wishart, EU Won't Adapt Customs Union Rules to Suit Britain, Barnier Says, *Bloomberg politics*, 26 April 2018, available online at <https://www.bloomberg.com/news/articles/2018-04-26/eu-won-t-adapt-customs-union-rules-to-suit-britain-barnier-says>.

Brussels' intransigence a determination, if never openly admitted, to administer what one senior British politician has described as a 'punishment beating'.³⁴

Whatever the intentions of Brussels for turning down the various hybrid proposals that is the British Government's principal negotiating strategy, there is as much at stake for EU27 as for in these diplomatic exchanges. Politics, even between allies and friendly neighbours is never straightforward, is by definition conflictual and these current negotiations are no exception. Only thorough-going nationalists with an exaggerated sense of national entitlement would expect anything other than hard bargaining from Brussels in defence of what the Commission's representatives see as its legitimate mandate to 'speak for Europe'. The United Kingdom's intermittent 'offers' vary as to their content but not their intention, a medley of what London has prescribed as 'workable solutions' to post-Brexit relations. Each of them framed in the certain knowledge that after Brexit day 'the border' between what will be two quite separate legal jurisdictions and economic regimes will become the locus for future trade and prospectively for positive political and security relations between former and close partners. Whether some workable arrangement is the way forward, the only feasible route out of present impasse, or instead is merely a many-headed hydra, a recipe for Britain crashing out without interim arrangements in place, thereby ensuring discord and chaos, remains to be seen. As things currently stand, any future outcome remains in the balance. All that can be said with any certitude about prospects for accommodation and compromise between two so far irreconcilable negotiating positions is that this outcome will require significant movement, compromise by both sides.

Even before Michel Barnier's tepid response to the 'final' British offer in the July 2018 White Paper, the Government in London had already decided to circumvent the Commission. To employ bilateral diplomacy, ministerial excursions to selected Member States seen as key players and prospective allies: tactics intended to unravel the Commission's united front and loosen its collective hold over the Member States on whose behalf it exercises a negotiating mandate on the terms for British withdrawal. British ministers have embarked on contemporary versions of the medieval pilgrimage of grace, an itinerary around EU capitals, with the intention of encouraging defections from the Commission line by some leading Member States by appealing to their distinctive national interests. These tactics (too disjointed to merit the descriptor of 'strategy') have been more scattergun and incremental than a grand design, and there is something of desperation about them as the clock ticks remorselessly on towards Brexit day.

To date there have been ministerial excursions to Belgium and Holland, countries whose economies and not least their Channel ports are closely aligned by ties of history and commerce to the British economy, regional economies it could be argued that have more to lose than most EU27 countries from a 'no deal' outcome. Similar logics explain recent visits by the Prime Minister and her senior ministers to France whose northern region has close economic ties with the United Kingdom and is anyway a critical player in the final endgame

³⁴ Matthew Tempest, Squabble over Boris Johnson's World War Two jibe, *EURACTIV*, 18 January 2017, available online at <https://www.euractiv.com/section/uk-europe/news/squabble-over-boris-johnsons-world-war-two-jibe/>.

that for the reasons of history and political rivalry might be inclined to obstruct British interests.³⁵ There has been energetic lobbying too of Germany's Chancellor and Foreign Minister, and no less so of that country's automobile and other high tech manufacturers.³⁶ There have been similar excursions to Italy and Greece, both countries where the migrant crisis has hit hard, and where London assumes it might receive a favourable hearing for its proposals to reduce mobility across borders and its flanking challenge to the superordinate role of the EU Court in determining these rules. Further ministerial visits to Poland, the Baltic states, the Czech Republic, Slovakia, Romania and Hungary have focused on reminding governments there of Britain's continuing role in providing support for security in what remains a far from stable neighbourhood, and countries whose domestic politics have embraced Euroscepticism, or where governing parties are more amenable to a looser and less centralized EU.

There is no convincing evidence that these excursions have actually changed minds, let alone weakened the political resolve of EU27 to maintain a solid front in its negotiations with the EU27. As one senior EU diplomat has interpreted these excursions: "The Brits are going on a charm offensive (and) from what I know it is not that effective; everybody is holding the line and I think it helps extremely to strengthen the EU27. I never thought the Brits were so charming but we will see....There is only one negotiator and this is Barnier".³⁷ Concern at what is seen by Brussels as an attempt to divide the EU27, not least invitations from London to attend bilateral Brexit seminars led to the Commission urging Member States to resist any attempt to 'side-line the Commission' and weaken collective resolve. A senior Commission official reiterated that should the present impasse continue, "No deal means no deal. No deal does not mean that we negotiate a series of mini deals".³⁸ If the present EU27 united front does hold, Britain's preference for a Brexit that encompasses some variant of the hybrid solution discussed in this paper will certainly evaporate. In that eventuality, London's options will be severely constrained: confined, either to 'crashing out' and a 'no deal outcome; or at best having to accept what the EU has argued for from the outset of these negotiations, continuing and close alignment in a customs union that maintains the integrity of the EU's current trade regime.

As the negotiations continue and without any apparent closure in sight, prospects for the latter outcome increase, with even the phlegmatic Governor of the Bank of England, Mark Carney, calling the chances of a 'no deal scenario' as "uncomfortable high" if "highly

³⁵ Lara Marlowe, May and Macron to discuss Brexit at president's summer residence, *The Irish Times* (Dublin) August 3 2018, available online at <https://www.irishtimes.com/news/world/europe/macron-and-may-to-discuss-brexit-at-president-s-summer-residence-1.3584777>.

³⁶ Peter Walker, Tory ministers to head across Europe to sell May's Brexit strategy, *The Guardian* (London), 29 July 2018, available online at <https://www.theguardian.com/politics/2018/jul/29/brexit-tory-ministers-face-constituency-backlash-chequers-deal>.

³⁷ Giulia Paravicini and Charlie Cooper, UK embarks on Brexit diplomacy tour of Europe, *Politico*, 29 September 2017, available online at <https://www.politico.eu/article/brexit-negotiation-uk-embarks-on-diplomacy-tour-of-europe/>.

³⁸ Jacopo Barigazzi and Charlie Cooper, Brussels issues demarche on alleged British divide-and-rule tactics, *Politico* (Brussels), 4 September 2018, available online at <https://www.politico.eu/article/brexit-michel-barnier-dominic-raab-brussels-warns-diplomats-against-uks-brexit-divide-and-rule-scheme/>.

undesirable’’.³⁹ Meanwhile, British business at every level and on all sides exhibits growing uncertainty, indeed alarm at what they see as a prospectively catastrophic fall-out, withdrawal without any future arrangements in place, and known by doomsayers as ‘blind Brexit’.⁴⁰ An outcome met with apparent insouciance by inveterate Brexiteers, who, when faced with the litany of practicable concerns resort to familiar tropes about ‘project fear’, putting their faith in rational optimality. Seemingly confident that EU governments will eventually break ranks, put their respective national interests before Commission ‘red lines’ and agreeing to settle. More prudent commentators however see this is merely capricious folly, risky gaming and without any certain outcome of success. As the end game approaches, the balance of probability favours those who are chary of such indeterminate risk more likely to end in tragedy than triumph. Only one of these two possible outcomes offers any assurance to those in Ireland and elsewhere in the EU concerned about achieve an outcome to the border issue that is essential for maintaining the steady progress made so far towards peace and reconciliation in that troubled land. Time alone will tell which option will prevail, although on the evidence so far we might hazard a guess, and prepare for a British ‘fall-out’. To say that however is perhaps to forget the law of unintended consequences, the contingency that shapes rather more than we might prefer to admit what actually happens in politics.

³⁹ Andy Bruce, B of E’s Carney sees ‘uncomfortable high’ risk of no deal Brexit, *Reuters World Business*, August 3 2018, available online at <https://www.reuters.com/article/uk-britain-eu-carney/boes-carney-sees-uncomfortably-high-risk-of-no-deal-brexit-idUSKBN1KO0VD>.

⁴⁰ Lisa O’Carroll, UK would run out of food a year from now with no-deal Brexit, NFU warns, *The Guardian* (London), 7 August, 2018, available online at <https://www.theguardian.com/politics/2018/aug/07/uk-run-out-of-food-no-deal-brexit-national-farmers-union>.